Supreme Court, U.S.
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No. 98-1784

IN THE

Supreme Court of the United States

TERESITA PACK,

Petitioner,

v.

KMART CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the mental activity of concentrating is a "major life activity" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A).

2. Should the determination of whether plaintiff's mental impairment of major depression is a "disability" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A), be made without regard to her use of mitigating or corrective measures, such as medication?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Steve Nicholas was listed as a party before the Court of Appeals, and the Equal Employment Opportunity Commission appeared as *amicus curiae* on behalf of the plaintiff-appellant in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN *BRAGDON V. ABBOTT* REGARDING THE SCOPE OF "MAJOR LIFE ACTIVITY" UNDER THE AMERICANS WITH DISABILITIES ACT 5

II THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT AND THE EEOC GUIDELINES WITH RESPECT TO THE STATUS OF CONCENTRATION AS A MAJOR LIFE ACTIVITY UNDER THE ADA, AND THE TENTH CIRCUIT'S DECISION ON THIS ISSUE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT 10

III. THIS COURT HAS PREVIOUSLY GRANTED CERTIORARI TO THE NINTH AND TENTH CIRCUITS ON THE QUESTION OF WHETHER A CLAIMED DISABILITY SHOULD BE EVALUATED WITHOUT REGARD TO MITIGATING OR CORRECTIVE MEASURES, INCLUDING MEDICATION 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases	Page
Abbott v. Bragdon, 107 F.3d at 939 (1st Cir. 1997)	8
Albertson's, Inc., v. Kirkingburg, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999)(No. 98-591)	15, 17, 19
Arnold v. United Parcel Service, Inc., 136 F.3d 854 (1st Cir. 1998)	13
Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998)	13
Bartlett v. New York State Bd. of Law Examiners, 156 F.3d 321 (2d Cir. 1999)	13
Bragdon v. Abbott, 118 S. Ct. 2196 (1998)	*passim*
Cleveland v. Policy Management Systems Corp., 120 F. 3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998)(No. 97-1008)	15
Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2d Cir. 1998)	6
Den Hartog v. Wasatch Academy, 129 F.3d 1076 (10th Cir. 1997)	9, 10, 13
Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997)	13
Doe v. Region 134 Mental Health-Mental Retardation Comm., 704 F.2d 1402, 1408 (5th Cir. 1983)	4
Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996)	13
Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997)	13

Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th Cir. 1996) 13

MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996) 8, 13

Matczak v. Frankford Candy & Choc. Co., 136 F.3d 933 (3d Cir. 1998) 13

Murphy v. United Parcel Service, Inc., 141 F.3d 1185 (10th Cir. 1998)(unpubl.), *cert. granted*, 67 U.S.L.W. 3027 (Jan. 8, 1999)(No. 97-1992) 15, 17, 19

Olmstead v. L.C., 138 F.3d 893 (11th Cir. 1997), *cert. granted*, 119 S. Ct. 617 (1998)(No. 98-536) 15

Pritchard v. Southern Company Services, 92 F.3d 1130 (11th Cir. 1996), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997) 7, 10

Sherback v. Wright Automotive Group, 987 F. Supp. 433 (W.D. Pa. 1997) 7, 11

Siemon v. A.T. & T. Corp., 113 F.3d 1175 (10th Cir. 1997) 13

Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999)(No. 97-1943) 13, 14, 15, 17, 19

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464 (5th Cir. 1998) 13

Statutes and Regulations

28 U.S.C. §1254(1) 1

42 U.S.C. §12101(a)(1) 7

42 U.S.C. §12102(2) 1

29 C.F.R. App. §1630.2(i) 9

29 C.F.R. §1630.2(i) 8

Other Authorities

"When Kids Can't Concentrate: Attention Deficit Disorder," 62 *Consumer Reports* 56 (Feb. 1997) 9

Oxford American Dictionary (Oxford 1980) 9

Keeley, Jim, "Practice Makes Perfect: Finding the Brain's Autopilot," 16 *Total Health* 28 (Apr. 1, 1994) 9

Guidance on Psychiatric Disabilities And the Americans with Disabilities Act, EEOC Compliance Manual (BNA) No. 59 (Mar. 27, 1997) 6, 11, 12

Diagnostic and Statistical Manual of Mental Disorders 4th ed. (American Psychiatric Association 1994) 16

Campbell, Robert Jean, M.D., *Psychiatric Dictionary* 70, 144 (Oxford 1989) 9

Balsam, Alan and Zahn, Albert, *Disability Handbook* §11.08 at 584 (McGraw-Hill 1990) 9

Rapaport, D., Gill, M. & Schafer, R., *Diagnostic Psychological Testing* at 105, Rev. ed. (Int'l Univ. Press 1975) 9

Petitioner, Teresita Pack, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Tenth Circuit was withdrawn upon the Court's denial of rehearing and is not reported. *See* 1998 WL 918313. The order on rehearing and the clarified opinion of the Court of Appeals are reported at 166 F.3d 1300 (10th Cir. 1999). These opinions are reprinted in Appendix A. The ruling of the United States District Court for the Eastern District of Oklahoma in *Pack v. Kmart Corp., et al.*, No. 96-CV-643-B was announced from the bench and is not published, but is reprinted in Appendix B.

STATEMENT OF JURISDICTION

The original judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 29, 1998. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc, withdrew its original opinion, and entered a new opinion and judgment on February 4, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, 42 U.S.C. §12102(2) provides:

§12102. Definitions

As used in this Act:

(2) Disability. The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; or

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

The fundamental questions presented are whether the mental activity of concentrating is a "major life activity" under the Americans with Disabilities Act ("ADA") and whether the evaluation of Ms. Pack's disability should be undertaken without regard to the medications she was taking to control her depression and sleep deprivation.

The opinion of the Court of Appeals adequately summarizes the factual record for the purposes of this appeal. Pack became employed with Kmart in 1976. Over the next eighteen years she worked in a variety of positions for Kmart with an excellent work record. In 1987, Pack transferred to a pharmacy technician position.

In late 1993, Pack began seeing her family physician for stress-related physical and emotional problems. She had impaired concentration and was suffering from sleep deprivation. One of the ways in which her impaired concentration manifested itself at work was through prescription errors.

After referral to a psychiatrist, Pack was diagnosed with major depression, moderate to severe, in July, 1994. Pack then began taking medications for her depression and sleep deprivation. Pack's poor concentration was specifically

noted by Kmart on her August, 1994 performance evaluation.

In June, 1994, and again in September, 1994, Pack took medical leaves of absence for treatment. After each medical leave, however, her concentration failed to significantly improve. In addition, Pack had been repeatedly requesting transfer to a variety of vacant positions requiring less concentration as a reasonable accommodation for her disability, but these requests were denied by Kmart.[1] After returning to work from her second medical leave, Pack's work failed to sufficiently improve and her employment was terminated by Kmart on February 2, 1995.

After timely filing a charge of disability discrimination and receiving a Notice of Right to Sue, Pack filed a complaint in the United States District Court for the Eastern District of Oklahoma against Kmart alleging, *inter alia*, disability discrimination under the Americans with Disabilities Act, 42 U.S.C. §12102, *et seq.*

In her action, Pack claimed that her mental impairment of major depression substantially limited her ability to perform the major life activities of concentrating and sleeping. Pack expressly did not claim that her ability to work was substantially limited.

Kmart's motion for summary judgment was denied, and the case proceeded to trial. At the conclusion of the evidence, Kmart moved for judgment as a matter of law under Fed. R. Civ. P. 50. The district court found that neither concentrating nor sleeping were major life activities,

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1/ The question of whether Kmart discriminated against Pack by refusing to transfer her to a vacant position as a reasonable accommodation is not presented, because of the Court of Appeals' holding that Pack cannot demonstrate that she is "disabled" under the Act. 166 F.3d at 1304 n.4.

and that even if they were, Pack's evidence of substantial limitation was legally insufficient to tender the case to the jury. App. B-2. Kmart's Rule 50 motion was granted and Pack appealed.

After reciting the controlling principles governing the ADA, the Court of Appeals analyzed the case in two parts.[2] First, the Court addressed the question of whether concentrating and sleeping were major life activities under the ADA. With virtually no discussion, the Court of Appeals held "that sleeping is a major life activity, but concentration is not." 166 F.3d at 1305; App. A-23. Although recognizing that "[c]oncentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking," the Court of Appeals nevertheless concluded that "concentration is not itself a major life activity." *Id.*

Having found that sleeping was a major life activity, the Court of Appeals next addressed the question of whether Packs' evidence that her sleeping was substantially limited was legally sufficient to send the case to the jury. In reviewing this evidence and finding it legally insufficient, the Court expressly evaluated Pack's sleep deprivation in its medicated state, noting that "Dr. Koduri was able to generally control Pack's sleep problems with medication,..." 166 F.3d at 1306; App. A-25-26. Accordingly, the Court of Appeals found Pack's evidence of sleep limitations to be legally insufficient.

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2 Because the defendant conceded the point, the Court of Appeals assumed for the purposes of the appeal that major depression is a mental impairment within the meaning of the ADA. 166 F.3d at 1304; App. at A-21. Depression has been held to constitute a mental impairment. *See Doe v. Region 134 Mental Health-Mental Retardation Comm.*, 704 F.2d 1402, 1408 (5th Cir. 1983)(Rehabilitation Act).

On the basis of these holdings, the district court's grant of judgment as a matter of law was affirmed. Pack filed a timely petition for rehearing and suggestion for rehearing *en banc*. On February 4, 1999, the Court of Appeals denied the petition for rehearing and the suggestion for *en banc* review, withdrew its earlier opinion, and filed a new opinion clarifying an evidentiary issue raised by petitioner.

Petitioner now asks this Court to review the judgment of the Court of Appeals, because the Tenth Circuit's opinion decides a question of federal law in a way that conflicts with this Court's decision in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998); because the question of whether concentrating is a "major life activity" under the ADA is an important question of federal law that has not been, but should be, decided by this Court; because the decision of the Tenth Circuit is in conflict with the decision of the Eleventh Circuit and the EEOC Interpretive Guidelines on this same question; and because this Court has already granted *certiorari* on the question of whether disabilities should be evaluated without regard to the use of medication.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN *BRAGDON V. ABBOTT* REGARDING THE SCOPE OF "MAJOR LIFE ACTIVITY" UNDER THE AMERICANS WITH DISABILITIES ACT.

Conceding that "[c]oncentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking," the Court of Appeals nevertheless holds as a matter of law that "concentration is not itself a major life activity." 166 F.3d at 1305; App. at A-23. In so holding, the Court of Appeals not only summarily rejects the EEOC's interpretive guidance that concentration is

a major life activity, but also arrives at a conclusion that is wholly inconsistent with the broad view of major life activities embraced by the United States Supreme Court in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998). *See* EEOC Compliance Manual (BNA) No. 59, at E-2 (Mar. 27, 1997).

In *Bragdon v. Abbott, supra*, this Court had occasion to address the scope of the major life activities included within the ADA.[3] In *Bragdon*, a dental patient with asymptomatic HIV disease challenged her dentist's refusal to treat her in his office as unlawful discrimination under the ADA. The patient asserted that asymptomatic HIV disease substantially limited her major life activity of reproduction. The dentist claimed, *inter alia*, that reproduction was not a major life activity, because Congress intended the ADA to cover only those activities that have a public, economic, or daily character. 118 S. Ct. at 2205. This Court soundly rejected that position:

> The argument founders on the statutory language. Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside of the meaning of the word "major." The breadth of the term confounds the attempt to limit its construction in this manner.

118 S. Ct. at 2205 [Emphasis supplied].

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3 The Court of Appeals correctly concluded that "[i]n deciding whether a particular activity is a 'major life activity,' we ask whether that activity is significant within the meaning of the ADA, rather than whether that activity is important to the particular individual." 166 F.3d at 1305; App. A-22-23. *See Bragdon v. Abbott*, 118 S. Ct. at 2204-05; *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642 (2d Cir. 1998).

This Court clearly believed that Congress intended to afford a broad view to the phrase "major life activity."[4] Noting that the regulations eschew the enunciation of a general principle to define "major life activity," this Court pointed to the non-exhaustive regulatory list of illustrative examples to undermine the dentist's argument. This Court then noted that the stated examples of caring for one's self and performing manual tasks belie the suggestion that major life activities must have a public or economic character. *Id.* Because the dentist "advance[d] no credible basis for confining major life activities to those with a public, economic, or daily character," the Court agreed with the conclusion of the Court of Appeals that reproduction is a major life activity under the ADA. *Id.*

The Court of Appeals' decision in the case at bar advances no credible rationale for concluding that concentration is not a major life activity. The Court of Appeals' decision implies that, although an important and necessary function, concentration cannot stand on its own as a major life activity because it is a component of other major life activities, such as learning or working. 166 F.3d at 1305; App. A-23. Like the dentist's argument in *Bragdon*, however, this conclusion runs aground on the rocks of the statutory language. There is nothing in the ADA or its implementing regulations that remotely suggest such a limitation on the scope of major life activities.[5]

4/ The Congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities" evinces the view of Congress that the sweep of the Act was intended to be broad. 42 U.S.C. §12101(a)(1).

5/ It is so evident that concentrating is a major life activity that other courts have assumed it to be so without much discussion. *See, e.g., Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1133-34 (11th Cir. 1996)(permitting plaintiff's claim to go to the jury on her ADA claim that her depression substantially limited, *inter alia*, her major life activity of concentrating), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997); *Sherback v. Wright Automotive Group*, 987 F.

Indeed, the major life activities identified in the regulations, together with those in the EEOC interpretive guidance that have been approved by the Tenth Circuit, compel an opposite conclusion. For example, the activity of "walking" is specifically mentioned as a major life activity in the regulations. 29 C.F.R. §1630.2(i). The activity of "standing" is identified in the EEOC interpretive guidance and is recognized by the Tenth Circuit in the decision below as a major life activity. 166 F.3d at 1305; App. A-22 & 23. *See also MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443-44 (10th Cir. 1996). In the same manner that concentration is an important and necessary component of learning, standing is an important and necessary component of walking. Yet both walking and standing are independently recognized as major life activities. Likewise, learning may be an integral component of working, and performing manual tasks may be a component of caring for one's self. Nevertheless, each of these activities are individually recognized by the regulation to be major life activities under the ADA. 29 C.F.R. §1630.2(i). The conclusion that an important and necessary brain function is not a "major life activity" solely because it is also a component of other major life activities must fail in the same way that the dentist's effort to limit the phrase failed in *Bragdon*.

The activity of concentrating is one of our most basic cognitive functions. As noted by the Court in *Bragdon*, the "'plain meaning of the word 'major' denotes comparative importance' and 'suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.' " 118 S. Ct. at 2205, *quoting with*

Supp. 433, 438 (W.D. Pa. 1997)(jury could find plaintiff disabled under ADA if it agreed that post traumatic stress disorder substantially limited, *inter alia*, the major life activity of concentrating).

approval, *Abbott v. Bragdon*, 107 F.3d at 939, 940 (1st Cir. 1997). One can hardly envision a mental activity any more important that the act of concentrating.

Defined as the ability to "employ all one's thought or attention or effort on something," the activity of concentrating is central to a wide variety of everyday tasks, including but not limited to learning, working, driving, shopping, preparing meals, and interacting with others. *Oxford American Dictionary* (Oxford 1980). *See also* Campbell, Robert Jean, M.D., *Psychiatric Dictionary* 70, 144 (Oxford 1989)(equating "concentration" with "attention"). The ability to concentrate "permits us to focus on a given subject despite the presence of other signals and stimuli." Balsam, Alan and Zahn, Albert, *Disability Handbook* §11.08 at 584 (McGraw-Hill 1990). *See also Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1081 n.2 (10th Cir. 1997)(citing *Disability Handbook* as authoritative); "When Kids Can't Concentrate: Attention Deficit Disorder," 62 *Consumer Reports* 56-57 (Feb. 1997)(noting that ADD results in lessened ability to control one's attention, that depression can mimic ADD, and that effects of ADD can be so pervasive as to disrupt daily life); Keeley, Jim, "Practice Makes Perfect: Finding the Brain's Autopilot," 16 *Total Health* 28 (Apr. 1, 1994)(attention is the collection of mental states that allow people to organize themselves in the world).

Concentration is fundamental to our ability to perform many of the tasks of daily living. It is clearly a basic and significant activity that the average person in the general population performs with little or no difficulty.[6] 29 C.F.R.

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[6] Any concern that the ability to concentrate cannot be adequately measured for comparison to the average in the general population is misplaced. The ability to concentrate can be reasonably evaluated with a variety of reliable psychological tests, most notably the Wechsler Adult Intelligence Scale-Revised (WAIS-R). *See* Rapaport, D., Gill, M. & Schafer, R., *Diagnostic Psychological Testing* at 105, Rev. ed. (Int'l

App. §1630.2(i). The rejection of concentration as a major life activity by the Court of Appeals cuts to the very heart of the protections afforded by the ADA for people with mental impairments. Just because we cannot "see" the inability to concentrate in the same way we can "see" the inability to walk does not render concentration any less significant in our daily existence. To deny a major brain function, such as concentration, status as a major life activity under the ADA would ignore the realities of mental illness and "would largely nullify the ADA's protection of the mentally disabled." *Den Hartog v. Wasatch Academy*, 129 F.3d at 1087.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT AND THE EEOC GUIDELINES WITH RESPECT TO THE STATUS OF CONCENTRATION AS A MAJOR LIFE ACTIVITY UNDER THE ADA, AND THE TENTH CIRCUIT'S DECISION ON THIS ISSUE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

In the case at bar, the Court of Appeals for the Tenth Circuit neither cited nor discussed the decision of the Eleventh Circuit in *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997).[7] In *Pritchard*, an electrical engineer suffering from depression was terminated from her employment after being placed on disability leave. She brought suit against her former employer asserting claims, *inter alia*, under the ADA and the Rehabilitation Act. She claimed that her depression

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Univ. Press 1975)(noting that the Digit Span and Arithmetic sub-tests of the WAIS are specific for attention and concentration).

[7] This case was presented to the Court of Appeals in the Brief *Amicus Curiae* of the Equal Employment Opportunity Commission.

substantially limited her major life activities of sleeping, concentrating, and communicating. 92 F.3d at 1132. The district court granted summary judgment to the employer and Pritchard appealed.

On appeal, the Eleventh Circuit analyzed the evidentiary materials and was able to conclude that Pritchard's "impairment does not substantially limit the major life activity of working." 92 F.3d at 1133. Finding, however, that there were genuine issues of material fact as to whether Pritchard suffered from other symptoms and whether those symptoms substantially limited a major life activity, the Court reversed the grant of summary judgment on the ADA and Rehabilitation Act claims. *Id.*

The Eleventh Circuit did not squarely hold concentration to be a major life activity as that precise issue was not directly decided by the district court. The Court's reversal of summary judgment after finding that Pritchard was not substantially limited in her ability to work, however, leaves little doubt that the Court regarded sleeping, concentrating, and communicating to be major life activities under the ADA. 92 F.3d 1133-34. Apparently, the Eleventh Circuit believed this conclusion to be so self-evident that no detailed discussion of the issue was deemed necessary. *See Sherback v. Wright Automotive Group*, 987 F. Supp. 433 (W.D. Pa. 1997) where, in rejecting the employer's motion for summary judgment, the court noted that "a fact finder could well determine plaintiff's impairment [of post traumatic stress disorder] has substantially limited many of his major life activities, including work, interaction with others, marriage, thinking, and concentration, and his claim under the ADA's first category of disability must be permitted to go forward." 987 F. Supp. at 438 [Emphasis supplied].

Moreover, the EEOC has expressly recognized that "mental impairments restrict major life activities such as

learning, thinking, concentrating, interacting with others, [footnote omitted] caring for oneself, speaking, performing manual tasks, or working." *Guidance on Psychiatric Disabilities And the Americans with Disabilities Act*, EEOC Compliance Manual (BNA) No. 59, at E-2 (Mar. 27, 1997). The EEOC issued its interpretive *Guidance on Psychiatric Disabilities And the Americans with Disabilities Act* for the express purposes of "facilitat[ing] the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability; respond[ing] to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and answer[ing] questions posed by employers about how principles of ADA analysis apply in the context of psychiatric disabilities." EEOC Compliance Manual (BNA) No. 59, at E-1 (Mar. 27, 1997). The EEOC apparently believed that additional guidance for psychiatric disabilities was necessary, because "people with psychiatric disabilities and employers...have posed numerous questions to the EEOC about this topic." *Id.*[8]

Notwithstanding the EEOC's clear recognition of concentration as a major life activity, the Court of Appeals flatly rejected the EEOC guidance without discussion or analysis, commenting only that the EEOC's guidance "does not carry the force of law and is not entitled to any special deference." 166 F.3d at 1305 n.5; App. A-22. This Court, however, has long regarded administrative interpretation within the sphere of an agency's expertise to be a proper source for guidance. Indeed, in *Bragdon v. Abbott, supra*, this Court commented:

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8 The EEOC noted that between July, 1992 and September, 1996, 12.7% of the charges filed with the EEOC were based upon emotional or psychiatric impairment. This represents a very significant number of individuals with mental impairments. EEOC Compliance Manual (BNA) No. 59, at E-1 n.3.

> Our holding is confirmed by a consistent course of agency interpretation....Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. [citation omitted]. It is enough to observe that the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." [citation omitted].

118 S. Ct. at 2207.

Historically, the Courts of Appeals, including the Tenth Circuit, have consistently relied upon the EEOC interpretive guidance of the ADA, except where a Court has expressly found the guidance to be in direct conflict with the statutory language of the ADA. *See, e.g., Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 899 & 901-02 (10th Cir. 1997); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1081 (10th Cir. 1997)(relying on EEOC interpretive guidance on psychiatric disabilities); *Siemon v. A.T. & T. Corp.*, 113 F.3d 1175, 1179 (10th Cir. 1997); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443-44 (10th Cir. 1996); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1173 (10th Cir. 1996). *See also, e.g., Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998); *Matczak v. Frankford Candy & Choc. Co.*, 136 F.3d 933 (3d Cir. 1998); *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir.

1996), *cert. denied*, 117 S. Ct. 1349 (1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2d Cir. 1999)(approving EEOC Guidance on mitigating measures in an ADA Title II case).

This principle was well illustrated in *Sutton*. In addressing the existence of the claimed impairment, the Court in *Sutton* followed the EEOC's Interpretive Guidance, because it was "reasonable and consistent with the statutory mandates themselves." 130 F.3d at 899. Conversely, in determining whether corrective measures should be considered in evaluating the extent of the limitation on a major life activity, the Court of Appeals chose to reject the EEOC Interpretive Guidance, because it "is in direct conflict with the plain language of the ADA." 130 F.3d at 902.[9] The *Sutton* Court's rejection of the Interpretive Guidance clearly articulated an analysis for the rejection. The Court of Appeals' decision in the case at bar, however, fails to explain in any respect why the EEOC Interpretive Guidance identifying concentration as a major life activity is rejected.

Although the EEOC Interpretive Guidance may not possess the same force of law as an agency regulation that has been promulgated through the Administrative Procedures Act, Pack contends that the EEOC's Guidance should be followed as long as it is reasonable and consistent with the

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9 Judge Barrett's opinion in *Sutton* , and a companion case from the Tenth Circuit, *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir. 1998)(unpublished disposition), held that corrective measures should be considered in determining whether an impairment is substantially limiting under the ADA. This Court granted *certiorari* to the Tenth Circuit on this issue in both of these cases. *See Sutton v. United Air Lines, Inc.*, 67 U.S.L.W. 3008 (Jan. 8, 1999)(No. 97-1943) and *Murphy v. United Parcel Service, Inc.*, 67 U.S.L.W. 3027 (Jan. 8, 1999)(No. 97-1992). It is noteworthy that the Tenth Circuit stands alone among the Circuit Court decisions in affirmatively holding that corrective measures should be considered in determining whether an impairment is substantially limiting.

language of the ADA. *Sutton v. United Air Lines, Inc.*, 130 F.3d at 899. Here, that guidance is both reasonable and consistent with the statute, and the Court of Appeals did not find otherwise.

Petitioner would have thought that this Court's decision in *Bragdon v. Abbott, supra*, answered the question of whether concentration is a "major life activity" under the ADA by virtue of this Court's broad interpretation of the statutory phrase. *See* Proposition I, *supra*. In a decision bereft of meaningful analysis, however, the Court of Appeals held that "concentration is not itself a major life activity." 166 F.3d at 1305; App. A-23. This holding cuts to the core of the protections afforded by the ADA for persons with psychiatric impairments and begs resolution by this Court.

It should first be noted that the determination of what constitutes a "major life activity" under the ADA is plainly a question of federal law. This was correctly recognized by the Court of Appeals. 166 F.3d at 1305, *citing Bragdon v. Abbott*, 118 S. Ct. at 2204-05; App. A-22-23.

The need to resolve this question of federal law cannot be gainsaid. Courts around the country and this Court have struggled to define the contours of the Americans with Disabilities Act. This is evident from the sheer volume of lower court decisions that continue to grapple with the basic definitions under the Act. It is particularly evident from the fact that this Court has granted *certiorari* in at least six ADA cases in its last two terms. *Bragdon v. Abbott, supra; Cleveland v. Policy Management Systems Corp.*, No. 97-1008; *Sutton v. United Air Lines, Inc.*,, No. 97-1943; *Murphy v. United Parcel Service, Inc.*, No. 97-1992; *Albertson's, Inc. v. Kirkingburg*, No. 98-591; *Olmstead v. L.C.*, No. 98-536.

Moreover, the rejection of concentration as a major life activity under the ADA serves to eviscerate the protections of the Act for individuals with many forms of mental illness. Indeed, impaired concentration is identified as a diagnostic criterion for most of the anxiety disorders, *e.g.*, posttraumatic stress disorder and obsessive-compulsive disorder, the mood disorders, *e.g.*, major depression and bi-polar disorder, and schizophrenia. *See generally Diagnostic and Statistical Manual of Mental Disorders* 4th ed. (American Psychiatric Association 1994).

Likewise, many individuals with organic brain disease would also be denied coverage under the ADA if concentration is not recognized as a major life activity. For example, an individual with Alzheimer's disease may suffer from significantly limited memory and/or concentration without yet being significantly limited in their ability to work or care for themselves. Under the decision of the Tenth Circuit, such an individual would not be covered under the ADA. Yet, few among us would argue that such an individual is not disabled as contemplated by the ADA.

This Court has not heretofore decided an employment case involving mental disability under either Title I of the ADA or the Rehabilitation Act. As is evident from the conflict between the Tenth and Eleventh Circuits and the Tenth Circuit's narrow view of "major life activity" as applied to mental impairments, guidance from this Court is sorely needed in this area. This need for guidance is underscored by the conflict between the Tenth Circuit and the EEOC's guidelines, and by the number of EEOC charges that involve emotional or psychiatric impairment. *See* note 8, *supra*. Accordingly, petitioner urges this Court to grant *certiorari* to provide guidance on this important question of federal law.

III. THIS COURT HAS PREVIOUSLY GRANTED CERTIORARI TO THE NINTH AND TENTH CIRCUITS ON THE QUESTION OF WHETHER A CLAIMED DISABILITY SHOULD BE EVALUATED WITHOUT REGARD TO MITIGATING OR CORRECTIVE MEASURES, INCLUDING MEDICATION.

Petitioner asks this Court to review the question of whether a "disability" under the ADA should be evaluated without regard to mitigating or corrective measures, including medication. Specifically, in the case of Ms. Pack, the Court of Appeals stated "we evaluate whether a physical or mental impairment is substantially limiting in a major life activity while taking into consideration any mitigating or corrective measures utilized by the individual, such as medications." 166 F.3d 1305-06 [Emphasis supplied][citing *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999)(No. 97-1943)]; App. A-24. The Court of Appeals further noted that "Pack was required to establish that she was unable to sleep or was significantly restricted as to the condition, manner, or duration of her ability to sleep... taking into consideration ... any mitigating or corrective measures. 166 F.3d at 1306 [Emphasis supplied](citations omitted); App. A-24. By noting that "Dr. Koduri was able to generally control Pack's sleep problems with medication," it is evident that the Court of Appeals evaluated Pack's sleep limitation in its medicated state. *Id.*

This Court has previously granted *certiorari* -- and by the time this petition is filed, will have heard argument -- in three separate cases raising substantially the same question. *Sutton v. United Airlines*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999)(No. 97-1943); *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir. 1998)(unpubl.), *cert. granted*, 67 U.S.L.W. 3027 (Jan. 8, 1999)(No. 97-1992); *Albertson's, Inc., v. Kirkingburg*, 143

F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999)(No. 98-591).

Petitioner adopts by reference the arguments advanced in the briefs of the petitioners and the supporting arguments articulated in the Briefs *Amicus Curiae* of the National Employment Lawyers Association in *Sutton*, 1999 WL 86487 and 86516 (No. 97-1943) and *Murphy*, 1999 WL 86488 and 86504 (No. 97-1992), and the arguments in the brief of the respondent in *Kirkingburg* (No. 98-591).

CONCLUSION

Petitioner, Teresita Pack, respectfully requests that this Court grant her Petition for Writ of Certiorari on the first question presented in order to resolve the conflict between its decision in *Bragdon v. Abbott* and the decision of the Court of Appeals in this case regarding the proper scope of the phrase "major life activity" within the meaning of the Americans with Disabilities Act. A grant of certiorari is also necessary to resolve the conflict between the Court of Appeals for the Tenth Circuit and the Court of Appeals for the Eleventh Circuit, as well as the EEOC interpretive guidelines for psychiatric disabilities.

Resolution of these conflicts is necessary to ensure that individuals with psychiatric impairments receive the full measure of protection under the ADA that Congress intended them to have. If concentration is not recognized as a major life activity under the ADA, an entire sub-class of individuals with mental impairments whom Congress intended to benefit will be denied coverage under the Act -- at least within the confines of the Tenth Circuit. No decision of this Court directly addresses the issues of mental disability in employment under the ADA or the Rehabilitation Act. Because this case cleanly presents the fundamental issue of which individuals with mental

impairments are disabled under the ADA, it is an appropriate case for this Court to begin its foray into this largely uncharted area of the law.

Petitioner further requests that her Petition be granted on the second question presented in order to preserve this issue pending this Court's decisions in *Sutton v. United Air Lines, Inc., supra, Murphy v. United Parcel Service, Inc., supra, and Albertson's, Inc. v. Kirkingburg, supra.*

Alternatively, petitioner requests that this case be remanded to the Court of Appeals for the Tenth Circuit with instructions to reconsider both questions presented in light of this Court's decisions in *Bragdon v. Abbott, supra, Sutton v. United Air Lines, Inc., supra, Murphy v. United Parcel Service, Inc., supra, and Albertson's, Inc. v. Kirkingburg, supra.*

Respectfully submitted,

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